1991

Stanley C. Jones, by and through his guardian, Raylene P. Jones v. Bountiful City Corp., a Municipal Corporation, and Rowena E. Beavers : Brief of Appellee

Utah Supreme Court

Layne Forbes; Darwin Hansen; Morgan & Hansen; Attorney for Defendant.
Brian S. King; Goicoechea Law Offices; Attorneys for Plaintiff/Appellant.

IN THE UTAH SUPREME COURT

STANLEY C. JONES, by and through his guardian, RAYLENE P. JONES, Plaintiff/Appellant, vs. BOUNTIFUL CITY CORP., a Municipal Corporation, and ROWENA E. BEAVERS, Defendants and Appellee (Bountiful only)	91-0602-CA Case No. [redacted] Priority No. 16

BRIEF OF DEFENDANT/APPELLEE BOUNTIFUL CITY

Layne B. Forbes (#1098)
Attorney for Defendant,
Bountiful City/Appellee
790 South 100 East
P. O. Box 369
Bountiful, Utah 84011-0369

Darwin Hansen
MORGAN & HANSEN
Attorney for Defendant,
Rowena E. Beavers
136 South Main, Suite 800
Salt Lake City, Utah 84101

BRIAN S. KING (#4610)
GOICOECHEA LAW OFFICES
4516 South 700 East, Suite 280
P. O. Box 17345
Salt Lake City, Utah 84107
Attorneys for Plaintiff/Appellant

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BRIEF OF DEFENDANT/APPELLEE
BOUNTIFUL CITY

STATEMENT OF JURISDICTION

Appellant, Stanley C. Jones, brings this appeal from a Summary Judgment of the Second Judicial District Court of Davis County, State of Utah, entered April 29, 1991. This court has jurisdiction pursuant to Utah Code Ann., Section 78-2-2(3)(j) (Supp. 1991).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW AND THE STANDARD OF APPELLATE REVIEW

A. Statement of Issues

1. Is Bountiful immune from suit for failure to facilitate the removal of foliage from private property?

2. Does Bountiful have a legal duty to facilitate the removal of foliage from private property?

3. Did the trial court abuse this discretion in granting Summary Judgment before Plaintiff's requested discovery was concluded?

B. Standard of Review

The standard of review, when considering a challenge to a Summary Judgment, is well settled. "A Summary Judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." Further, when reviewing conclusions of law on the challenge to Summary Judgment, a review is made of those conclusions for correctness. Breuer - Harrison, Inc. v. Combe, 799 P2d 716 (Utah App., 1990).

STATUTES INVOLVED

Section 63-30-2 of the Governmental Immunity Act ("Act"), Utah Code Annotated:

> (a) "Governmental function" means any act, failure to act, operation, function or undertaking of a governmental entity whether or not the act, failure to act, operation, function, or undertaking is characterized as governmental, proprietary, a core governmental function, unique to government, undertaking in a dual capacity, essential to or not essential to a government or governmental function, or could be performed by private enterprise or private persons.
>
> (b) A "governmental function" may be performed by any department, agency, employee, agent or officer of a governmental entity.

Section 63-30-3 of the Act:

> Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function. . . .

Section 63-30-8 of the Act:

> Immunity from suit of all governmental entities is waived for any injury caused by a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located thereon.

Section 63-30-10 of the Act:

> (1) Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury:
>
> (a) Arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused;
>
> (d) arises out of a failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property.

Section 41-6-19, U.C.A.:

> (1) The owner of real property shall remove from his property any tree, plant, shrub, or other obstruction or part of it which, by obstructing the view of any operators, constitutes a traffic hazard.
>
> (2) When the Department of Transportation or any local authority determines upon the basis of an engineering and traffic investigation that a traffic hazard exists, it shall notify the owner and order that the hazard be moved within 10 days.
>
> (3) The failure of the owner to remove the traffic hazard within 10 days is a Class C misdemeanor.

Rule 56(f) of the Utah Rules of Civil Procedure:

> **(f) When affidavits are available.** Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit the facts essential to justify his opposition, the court may refuse the Application for Judgment . . . .

STATEMENT OF THE CASE

A. Nature of the Case

Plaintiff, while driving his motorcycle, collided with another motor vehicle at an intersection. The Plaintiff filed an action against Bountiful, alleging a failure to properly

mark an intersection and to remove or order the removal of foliage located on private property on a corner lot next to the intersection.

B. Course of Proceedings and Disposition Below

The trial court granted Defendant Bountiful City a Summary Judgment on the grounds of governmental immunity and that Bountiful had no legal duty.

STATEMENT OF FACTS

1. On or about September 13, 1987, the plaintiff, Stanley C. Jones, was driving his motorcycle eastbound on Beverly Way in Bountiful, Utah. (Amended Complaint, Paragraph 3, R-147)

2. As he was approaching or entering the intersection at 1200 East, an automobile entered the intersection travelling southbound and the plaintiff collided with that motor vehicle within the intersection. (Complaint, Paragraph 2)

3. The intersection is uncontrolled by a traffic control device. (Affidavit of Jack P. Balling, R-48)

4. A residential lot and home is located on the northwest corner of said intersection. (Affidavit of Jack P. Balling, R-48 and Exhibit A, R-50)

5. The east and south lot line of said residential lot is located adjacent to the inside line of a 4 ft. sidewalk. (Affidavit of Jack P. Balling, R-48 and Exhibit A, R-50)

6. On the outside of the sidewalk is located a 6 ft. park strip and then curb and gutter. (Affidavit of Jack P. Balling, R-48 and Exhibit A, R-50)

7. Rosebushes were located on the east portion of the lot next to the inside of the sidewalk. (Affidavit of Jack P. Balling, R-48 and Exhibit A, R-50)

8. The rosebushes and trees that were located on the northwest corner were all located on the inside of the sidewalks on private property and were owned and maintained by private ownership. The south edge of the rose bushes was located approximately 20-22 feet from the intersecting point of the curb lines of the intersecting streets. (Affidavit of Jack P. Balling and Exhibit "A", R-48, Affidavit of Russell L. Mahan, R-51)

9. Both before and after September 13, 1987, the decision of placing, or not placing, traffic control devices such as stop signs is recommended by the Traffic Safety Committee of Bountiful City subject to approval by the Bountiful City Council. (Affidavit of Jack P. Balling, R-48)

SUMMARY OF ARGUMENT

1. Bountiful is immune from suit for failure to facilitate the removal of foliage from private property. The enforcement of or failure to enforce statutes, ordinances, decisions, or requirements is a discretionary function under Section 63-30-10(1)(a). Bountiful is also immune from suit for making an alleged inadequate or negligent inspection of property under Section 63-30-10(1)(d). Section 63-30-8 of the Act waives immunity for a defective, unsafe, or dangerous condition of a road but has no application to removal of foliage on private property.

2. Bountiful has no legal duty to facilitate the removal of foliage from private property. There is no statutory duty and there is no common law duty to do so. Bountiful has no legal duty to enforce ordinances with respect thereto.

3. Bountiful is immune from suit for failure to place traffic control devices

in that the decision or the failure to make a decision with respect to the placement of traffic control devices is a discretionary function under Section 63-30-10(1)(a) of the Act. Also, there is no legal duty to place traffic control devices at an intersection. Section 63-30-8 does not waive immunity in that it relates to the waiver for injuries caused by defective, unsafe, or dangerous conditions of a road. In the present case, the failure to place a traffic control device is not a condition of the road.

4. The trial court did not abuse its discretion in granting Summary Judgment before Plaintiff's requested discovery was completed. Plaintiff had more than two years and two months before filing a Certificate of Readiness for Trial in which to undertake discovery procedures. In response to Bountiful's Motion for Summary Judgment, Plaintiff did not file Rule 56(f) affidavit. The information sought to be discovered was not relevant to a Motion for Summary Judgment.

ARGUMENT

I.

BOUNTIFUL IS IMMUNE FROM SUIT FOR FAILURE TO FACILITATE THE REMOVAL OF FOLIAGE FROM PRIVATE PROPERTY.

For purposes of reference herein, Appellant Stanley C. Jones will be referred to as "Plaintiff" and Appellee Bountiful City Corporation will be referred to as "Bountiful".

Section 63-30-3 Utah Code Annotated of the Governmental Immunity Act (Act) provides:

> Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function. . . .

Section 63-30-2 of the Act provides:

> (a) "Governmental function" means any act, failure to act, operation, function or undertaking of a governmental entity whether or not the act, failure to act, operation, function, or undertaking is characterized as governmental, proprietary, a core governmental function, unique to government, undertaking in a dual capacity, essential to or not essential to a government or governmental function, or could be performed by private enterprise or private persons.
>
> (b) A "governmental function" may be performed by any department, agency, employee, agent or officer of a governmental entity.

A. Immunity under Section 63-30-10(1)(a)

The Act provides for waivers of immunity under certain circumstances. The only waiver of immunity remotely applicable here is Section 63-30-10 of the Act, which provides, in part, as follows:

> (1) Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury:
>
> (a) Arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused;

It is clear that immunity is waived for a negligent act or omission of an employee, but immunity is retained if the act or omission is a discretionary function.

Representative cases are here submitted which declare the virtually unanimous rule that the enforcement or failure to enforce a statute, ordinance, decision, or requirement is a discretionary function and thus, such claim based upon such failure is immune from suit. In Bainter v Chalmers Township, McDonough County, 555 NE2d 1195 (Ill., 1990) the case involved a collision between the plaintiff's automobile and a school bus. The court held:

> The township has no common law of duty to widen roads, smooth gravel, erect signs or mow weeds. . . . while the officials have an absolute immunity from lawsuits challenging the acts of judgment or discretion.
>
> Absent statutory or common law duty, moreover, it is up to the township's discretion to decide whether road improvements such as clearing the brush in the instant case were necessary.

In Carter v City of Stuart, 468 S2d 955 (Fla., 1985), the plaintiff alleged that the city failed to enforce an ordinance requiring impoundment of dangerous dogs. The trial court rendered summary judgment; the Supreme Court affirmed:

> Deciding which laws are proper and should be enacted is a legislative function. . . . The judicial branch should not trespass into the decisional process of either.
>
> . . . We conclude the city had no liability.

In Hurley v Town of Hudson, 296 A2d 905 (New Hampshire, 1972) the plaintiff alleged that the town had improperly approved a subdivision plan lacking a system for storm drainage. The Supreme Court held:

> The planning board's approval of the subdivision plan without adequate drainage facilities in this case is precisely the type of "discretionary", "governmental", or "quasi-judicial" decision which should not subject a town to potential liability in tort.

In Randall v Delta Charter Township, 328 NW2d 562 (Mich., 1982) a personal representative of his five-year-old son who drowned brought an action. The plaintiff alleged that the condition of the inlet was in violation of the township's zoning ordinance and that the township had a duty to abate the zoning violation. The court held:

> In our view, the activity involved here must be deemed to be within the protection of the statute. To hold otherwise would severely discourage municipalities from enacting ordinances which provide for the welfare of their citizens out of fear that their failure to zealously enforce those ordinances would open the flood gates of litigation. Therefore, we find that decisions of

a planning commission or other similar local agency concerning whether to enforce zoning ordinances are decisions which are so basic to the operation of the municipality any attempt to create liability with respect thereto would constitute an unacceptable interference with the municipality's ability to govern.

See: Mitchell v. Cleveland Electric Illuminating Company; City of Avon, 507 NE.2d 352 (Ohio, 1987). (Municipality's determination as to what facts constitute a nuisance is a policy-making decision requiring discretion.) State v. Flanigan, 49 NE.2d 1216 (Ind. App. 1986). (Enforcement of parking regulations was discretionary.) Everton v. Willard, 468 So.2d 936 (Fla., 1985). (Decision not to arrest motorist on an intoxication charge was discretionary.) Christopher v. Baynton, 367 NW.2d 378 (Mich. App., 1985). (Enforcement of animal control ordinance was discretionary.) Lewis v. Estate of Robert Smith, 727 P.2d 1183 (Ida., 1986). (Failure to enforce fire code was discretionary.) Glenn v State of New York, 543 NY S2d 632 (N.Y., 1989). (Failure to enforce traffic law created no cause of action in favor of driver.) Curtis v County of Cook, 456 NE 2d 116 (Ill., 1983). (County had no duty to deter speeding or enforce traffic laws.) Ochoa v Sherman, 534 P2d 834 (Colo., 1975). (Municipality had no duty to enforce ordinance.) Carney v Department of Transportation, 378 NW2d 574 (Mich., 1985). (The Department of Transportation's duty to maintain a road in reasonable repair does not require the deforestation of surrounding countryside.) Ferentchak v Village of Frankfort, 459 NE2d 1085 (Ill., 1984). (No duty to enforce zoning ordinance.)

B. Immunity under Section 63-30-10(1)(d)

Section 63-30-10(1)(d) provides:

(1) Immunity from suit of all governmental entities is waived for injury proximally caused by a negligent act or omission of an employee

committed within the scope of employment except if the injury:

(d) arises out of a failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property.

The plaintiff apparently alleges that the defendant failed to adequately inspect or investigate the private property on the northwest corner of the intersection of 1200 East Beverly Way and determine as to whether or not there was a traffic hazard.

Our Supreme Court has held that the State is immune under this section for its failure to make an O.S.H.A. inspection of an industrial site. White v. State, 579 P.2d (Utah, 1978).

In Cochran v. Herzog Engraving Company, 205 Cal. Rptr. 1 (Cal. App. 1 Dist., 1984), parents of a son whose death resulted from fire at a company plant alleged that the city failed to inspect the company's premises. The court held that the government code section granted immunity from liability for any negligent inspection of property, and further went on to state:

> If immunity were not applicable in situations such as that presented by the facts in this case, municipalities would be exposed to unwarranted and insupportable risk of liability.
>
> . . . The language of these provisions is sweeping. They have been broadly construed by the courts in this state to provide immunity under circumstances quite similar to those before.

In Sisk v. National Railroad Passenger Corporation and the City of Cimarron, 647 F. Sup. 861 (Kan., 1986), a wrongful death action was brought for damages rising out of an automobile/train accident. The complainant alleged, inter alia, that the city was negligent in failing to remove brush and shrubs from the crossing. The court held that the city had no duty to remove the obstructions or to inspect for obstructions on property

belonging to another, or for failure to inspect property which does not belong to the government to determine whether it contains a hazard to public safety.

In O'Connor v. City of New York, 447 NE2d 33 (NY, 1983), the court held that a municipality could not be held liable for its inspector's failure to discover a leak in a gas system.

See: National Spring Company v. Pierpont Associates, Inc., 368 A2d 973 (NJ, 1976) (city immune for negligent inspection); Modlin v. City of Miami Beach, 201 S2d 70 (Fla., 1967) (city not liable for building inspector's alleged negligent inspection.); City of Tyler v. Ingram, 164 SW2d 516 (Tex., 1942) (municipality not liable for negligence of building inspector in inspecting building.)

C. Section 63-30-8 does not waive immunity

Section 63-30-8 of the Act provides as follows:

> Immunity from suit of all governmental entities is waived for any injury caused by a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located thereon.

Plaintiff urges that Section 63-30-8 of the Act constitutes a waiver provided by Section 63-30-10(1)(a) and (d). This is not so. Section 63-30-8 of the Act constitutes a waiver for injuries caused by "defective, unsafe, or dangerous condition of any highway, road, . . . or other structure located thereon." It is abundantly clear that such waiver has no application to a condition (such as foliage) which is not located on the road or highway but is located well back on private property.

Even so, the 1991 Legislature amended Section 8 and added "unless the injury arises out of one or more of the exceptions to waiver set forth in Section 63-30-10, immunity

from suit of all governmental entities is waived . . . ." While the amendment was made effective April 29, 1991, it was an obvious attempt to clarify the unclearness between the relationship of Section 63-30-8 and Section 63-30-10. It obviously does not represent a change in philosophy as to immunity.

II.

BOUNTIFUL HAS NO LEGAL DUTY TO FACILITATE REMOVAL OF FOLIAGE FROM PRIVATE PROPERTY.

A. No statutory duty

Plaintiff cites Section 41-6-19, U.C.A., and suggests that it creates a legal duty for both the owner of the private property and Bountiful City to remove foliage obstructing the view of the vehicle operator. The statute is as follows:

> (1) The owner of real property shall remove from his property any tree, plant, shrub, or other obstruction or part of it which, by obstructing the view of any operators, constitutes a traffic hazard.
>
> (2) When the Department of Transportation or any local authority determines upon the basis of an engineering and traffic investigation that a traffic hazard exists, it shall notify the owner and order that the hazard be moved within 10 days.
>
> (3) The failure of the owner to remove the traffic hazard within 10 days is a Class C misdemeanor. [Emphasis added]

The appellant cites Board of Education of Granite School District v. Salt Lake County, 659 P2d 1030 (Utah, 1983), Kelston v. Schwendiman, 668 P2d 509 (Utah, 1983), Moore v. Schwendiman, 750 P2d 204 (Utah, 1988). These cases have no application. They are not even remotely analogous to Section 41-6-19, U.C.A. They do indicate, however, that the intention of the Legislature is controlling and no formalistic rule of grammar or word form should stand in the way of carrying out the legislative intent.

Whether a law is mandatory or a directory is a matter of construction based upon legislative intent. In Sjostrom v. Bishop, 393 P.2d (Utah, 1964), the court held that the following statute is directory only: [10-6-18, U.C.A., 1953]

> Every elective officer in a city . . . . shall within 30 days . . . . publish . . . . a sworn statement of all his election and campaign expenses. [Emphasis added]

If further held in determining whether a statute is mandatory and self-executing or directory only:

> It best serves our purposes here to point out generally that there are at least some guidelines to be followed. The most fundamental one is that the court should give effect to the intention of the legislature.

In Cochran v. Herzog Engraving Company, (Supra.), the court held:

> Not every statute or municipal ordinance which uses the word "shall" is obligatory rather than permissive.
>
> * * * * *
>
> Assuming without deciding that the duties alleged by appellants are "mandatory", we find that they still come within the scope of applicable immunity provisions.

The language of Section 41-6-19, imposes no duty whatever. The terms "may" or "shall" are not present expressly or implied as to the conducting of a study to determine a hazard. It simply provides that when a study is done and if it shows a hazard, then the property owner is to be notified.

Paragraph (1) creates a duty on the part of the landowner. Paragraph (2) is merely a mechanism to enforce Paragraph (1) upon the landowner.

The Utah Legislature clearly did not intend that the city be responsible for clearing obstructions. Prior to 1979, Section 41-6-19 required cities to remove obstructions

"from the highways" (not private property). Then in 1979 the Legislature clearly stated its intention that property owners clear out obstructions on their property by stating: "It shall be the duty of the owner of real property to remove . . . obstructions." The 1987 amendment changed the wording but not the duty upon the owner and strengthened the penalty by making it a misdemeanor. Clearly then, insofar as local authorities are concerned, there is no duty.

B. No common law duty

Plaintiff's claims are based upon tort and upon negligence. A tort is defined as a "violation of a duty imposed by law." Lowry v. Kansas City, 85 SW2d 104.

The cases here declare the uniform rule that governmental entities have no legal duty to control foliage on private property.

In Stevens v Salt Lake County, 478 P2d 496 (Utah, 1970) which is controlling, a 13-year-old boy was riding his motorized minibike along a path on a vacant lot. As he emerged through brush and weeds onto a county road, he collided with a motor vehicle on that road. The trial court granted the county's motion for summary judgment. On appeal, the Supreme Court affirmed, and held:

> Claimant's averment as to fault on the part of the county does not stem from any condition upon or within the public roadway itself. Rather, it is based upon his contention that weeds and brush growing alongside the roadway so obscured the view of travelers thereon that this constituted a "defective, unsafe, or dangerous condition of the highway," which it was the duty of the county to remedy and for which liability was removed by our governmental immunity act.[9] This statute does not create any liability where none would have theretofore existed. Its sole purpose and effect is to remove sovereign immunity in situations where there would have been liability but where sovereign immunity formerly prevented recovery.
>
> Our concern is with the particular fact shown in this case: Where the pathway

upon which the plaintiff traveled and entered into Spring Lane was upon private property, and upon which were growing whatever weeds and brush obstructed his view. It would place a wholly impractical burden upon counties if they had to assume the duty of correcting such conditions with respect to every private way that enters upon a public road.

. . . . It is our opinion that the trial court could properly conclude, as it did, that the averments of the plaintiff failed to show that there was any "defective, unsafe, or dangerous condition" in the highway for which the county was responsible and had a legal duty to correct or that there was any violation of such a duty which was the proximate cause of plaintiff's injuries. [Emphasis added]

[9] Section 8, Ch. 139, S.L.U. 1965, codified as Section 63-30-8, U.C.A. 1953.

In Prokop v. Wayne County Board of Road Commissioners, 456 NW2d 66 (Mich., 1990), the plaintiff was riding her bicycle in a westerly direction on a sidewalk and was struck by a northbound vehicle at the intersection. At the southeast corner of the intersection, there was a six-foot hedge growing on private property. The court held:

The plaintiff argues that by not removing the six-foot hedge located on private property that obstructed the view of travelers, the county failed to maintain the intersection in a condition reasonably safe and fit for public travel. We disagree.

Clearly, statutory duty to trim hedges is imposed upon the person owning or occupying the property -- not upon the county. Similarly, we reject the claim that the county has a duty to enforce a comparable Redford Township ordinance. We agree with the general rule that governmental agencies are not liable for failure to investigate or enforce an ordinance violation.

Thus liability may not be imposed upon the defendant for a hedge located on private property which obstructs the view of travelers.

In Slavin v City of Tucson, 495 P.2d 144 (Ariz., 1972), the court held:

The determination of the liability of the municipality in a case involving the obstruction of view at an intersection must commence with the subject of the duty owned by the municipality to persons traveling on its streets. First, there is no duty on the city to maintain unobstructed view intersections.

In McGough v City of Edmonds, 460 P2d 302 (Wash., 1969), the plaintiff was involved in an accident at an intersection where there was a heavy undergrowth of brush on one of the corners of the intersection. He brought an action against the city for failure to remove the underbrush. The court granted Summary Judgment in favor of the city and, on appeal, the Court of Appeals held:

> There is no duty on the city to maintain unobstructed view intersections.

C. No Legal Duty to Enforce Ordinances

The cases are well settled that governmental entities have no legal duty to enforce statutes or ordinances.

The uniform rule law is stated in McQuillan Mun. Corp., Section 54.22d (3rd Ed.):

> The enactment of ordinances is a legislative function, as is the enforcement thereof. . . . and in most jurisdictions a municipality is not liable for failure to enforce ordinances and laws which have been enacted. Fortiori, tort liability may not be imposed upon the city for violation of an ordinance, even though the ordinance has become a standard of care and the measure of liability so far as the conduct of members of the general public is concerned.

The Utah courts follow this rule. In Obray v. Malmberg, 44 P.2d 160 (Utah, 1971) a sheriff was not liable for a decision not to enforce burglary statute by failing to investigate a burglary in plaintiff's store. In Christenson v. Hayward, 694 P2d 612 (Utah, 1984), the complaint alleged negligence of two deputy sheriffs which was based upon their failure to arrest plaintiff's decedent. The complaint further alleged that deputies were under a statutory duty as provided in Section 17-22-2 UCA, which provides:

> The sheriff shall: (1) Preserve the peace, (2) Make all lawful arrests . . . [Emphasis added]

The court stated:

> The plaintiff concedes that in the past, the courts have held that statutory duties, as provided as above, are owed to the public and not to particular individuals. . . . The statute does not impose any duty to arrest on a private citizen, only a privilege to do so.

In Arizzi v. City of Chicago, 569 NE.2d 68 (Ill., 1990), the mother of a child who was injured on a defective porch located on private property brought an action against the city. The plaintiff alleged that the city breached its affirmative duty to verify that the owner of the apartment complied with a court order to render the building safe and secure. Plaintiff suggested the theory that the city may be liable for its failure to fulfill the duty imposed on it by the municipal code, which provided:

> Section 39-11. The commissioner of the inspectional services . . . shall have the power and it shall be [his] . . . duty to order any building premises closed where it has been discovered that there has been any violation of any of the provisions of this code.

The court held:

> The foregoing provisions of the municipal code appear to impose an affirmative duty . . . on the city to order the owner of any building . . . to remedy violation after notice thereof.
>
> Municipal ordinances designed to protect the public at large impose no corresponding duty at common law to protect individuals of the public unless the plaintiff can show that the municipality owes him or her a special duty that is different from its duty to the general public. (Numerous cases cited.)
>
> A special duty can arise in two instances: When a municipality acts in a private instead of a governmental capacity or when it develops a relationship with an individual. (Cases cited.) This special relationship is created when the municipality becomes actually aware of the danger to a particular plaintiff before the injury complained of occurs.

The foregoing court quoted from Stigler v. City of Chicago (1971), 268 NE.2d 26, with approval:

> If the failure of the city to enforce this ordinance should render it liable for injuries sustained thereby, the tremendous exposure to liability would certain dissuade the city from enacting ordinances designed for the protection and welfare of the general public, and thereby the general public would lose the benefit of salutory legislative enactments.

In O'Connor v. City of New York, (Supra.), an action was brought against a municipality for deaths and injuries from a gas explosion. The court held:

> It is beyond dispute the city inspector should not have authorized issuance of the blue card. City regulations required that every part of a new or altered gas piping system be inspected. (Administrative code of City of New York, Section C26-1606.1.) Such an examination surely should have disclosed the open-end pipe. Nonetheless the City of New York may not be held liable to the plaintiffs here for omission of its inspector. It is well settled that absent a special relationship creating a municipal duty to exercise care for the benefit of a particular class of individuals no liability may be imposed upon a municipality for failure to enforce the statute or regulation.

In Shore v. Town of Stonington, 444 A.2d 1379 (Conn., 1982), a drunk driver had been stopped but not arrested by a police officer; was subsequently involved in another accident with fatalities. Plaintiff claimed the cause of action existed against the town for the failure of the police officer to enforce Connecticut's general statutes. The court held:

> We turn to the question of whether the trial court correctly concluded that Sylvia's duty was public in nature and he owed no specific duty to Mrs. Shore to arrest Cugini for violation of (general statutes).
>
> . . . If the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it or inadequate erroneous performance must be a public and not an individual injury. . . . If the duty is a duty to an individual, then a neglect to perform it or to perform it properly is an individual wrong.
>
> * * * * *
>
> . . . The adoption of a rule of liability where some kind of harm may happen to someone would cramp the exercise of official discretion beyond the limits desirable in our society. Should the officer try to avoid liability by removing from the road all persons who pose any potential hazard, he may

> find himself liable in many instances for false arrest. We do not think that the public interest is served by allowing a jury of laymen with the benefit of 20-20 hindsight to second-guess the exercise of a policeman's discretionary professional duty. Such discretion is no discretion at all.

See: Stanger v. New York State Electric and Gas Corp., City of Ithaca, et al., 268 NYS.2d 214 (New York, 1966) (no duty to enforce building code); Ferentchak v. Village of Frankfort, (Supra.) (no duty to enforce building code and ordinances, no special duty to homeowner); Whitney v. City of New York, 782 NYS.2d 783 (New York, 1966) (no duty to enforce administrative code -- no liability to carry out statutory function); Sisk v. National Railroad Passenger Corporation; City of Cimarron, Kansas et al., (Supra.) (city had no duty to remove obstructions on property owned by the railroad, notwithstanding statutory provisions); Williamson v. Pavlovich, 543 NE2d 1242 (Ohio, 1989), (municipality may not be found liable for failure to conform to municipal ordinance and/or state statute); Worth Distributors Inc. v. Latham, 451 NE.2d 193 (NY, 1983) (city not liable for failure to enforce building code relating to building safety); Singleton v. City of Hamilton, 515 NE.2d 8 (Ohio App., 1986) (city had no duty to enforce statutory regulations relating to the overseeing of hazardous waste disposal sites).

III.

BOUNTIFUL IS IMMUNE FROM SUIT FOR FAILURE TO PLACE TRAFFIC CONTROL DEVICES AND THERE IS NO LEGAL DUTY

Appellant does not argue in his Argument that a municipal corporation has a duty to install traffic control devices, but he briefly mentions it (but presents no authorities) in Paragraph 5 of his Statement of the Issues Presented for Review and the

Standards of Review (Page 3 of Appellant's Brief). Bountiful, however, presents cases and authorities in this Argument III in the event that Plaintiff raises and argues the issue hereafter in his Reply Brief.

In Argument I of this Brief, Bountiful cites Sections 63-30-3 and 63-30-2 of the Act. Bountiful makes reference to those sections without repeating them.

The Act provides for waivers of immunity under certain circumstances. The only Waiver of Immunity remotely applicable here is 63-30-10 of the Act, which provides in part as follows:

> (1) Immunity from suit of all governmental entities is waived for injury proximally caused by a negligent act or omission of an employee committed within the scope of employment, except if the injury:
>
> (a) arises out of the exercise or performance or failure to exercise or perform discretionary function, whether or not the discretion is abused; [Emphasis added]

It is clear that immunity is waived for a negligent act or omission of an employee, but immunity is retained if the act or omission is a discretionary function.

A. Discretionary Function

The issue of whether marking or not marking an intersection with traffic control devices is discretionary is well settled by case law. Defendant has made an exhaustive study of relevant cases in the reporter systems and will present numerous cases representative of the overwhelming general rule.

The case of Gleave v Denver and Rio Grande Western Railroad Company, 749 P2d 660 (Utah, 1988) is dispositive of this case. The plaintiff was travelling on 1600 South Street in Springville, Utah, and collided with a train where the railroad tracks

intersected the street. The Fourth District Court dismissed the Department of Transportation out of the suit on the grounds of governmental immunity. The case was appealed and the Court of Appeals affirmed. The court held:

> We must next determine whether UDOT's allegedly negligent failure to install different safety signals at the 1600 South crossing in Springville is a discretionary function within the meaning of Utah Code Annotated, Section 63-30-10(1)(a). . . (p. 668)
>
> The Utah Supreme Court has stated that the "discretionary function" exception was intended to shield those governmental acts and decisions impacting on large numbers of people in a myriad of unforeseeable ways from individual and class legal actions for the continual threat of which would make public administration all but impossible. . . .
>
> The basic governmental object involved in installing, maintaining, reconstructing and improving safety devices is the consistent promotion of public safety, a basic government objective. . . .
>
> We, therefore, hold that UDOT's failure to install different safety signals or devices at the subject crossing was a purely discretionary function within the meaning of Section 63-30-10(1)(a). (p. 669) [Emphasis added]

The defendant submits that **Gleave** is controlling here. The issue in **Gleave,** as it is here, is whether failure to install traffic control devices on a public street is a discretionary function. The court said in **Gleave** that it was discretionary and UDOT was immune from suit under Section 63-30-3(1)(a), and the court here should say likewise.

In Duncan v Union Pacific Railroad, 790 P2d 595 (Utah, 1990) the heirs of victims of a train-automobile accident brought an action against the railroad and the Department of Transportation alleging, inter-alia, that UDOT was negligent in providing traffic control devices on the street prior to its intersection with the railroad tracks. The trial court granted summary judgment. On appeal, the court affirmed and held:

> Governmental immunity is UDOT's principal defense against plaintiffs.

> Governmental immunity shields sovereign policy-making and discretion from state-law damage claims. . . (p. 600)
>
> Resolution of the governmental immunity question in this case is controlled by **Gleave,** which held that UDOT was governmentally immune in determining the precise method to be used in warning persons on a public road approaching a railroad crossing. We follow **Gleave**. . . . [Emphasis added]

In O'Guin v Corbin, 777 SW2d 697 (Tenn. App, 1989) the driver of an automobile which collided with another automobile at an unmarked intersection sued the other driver and the county. The trial court dismissed the complaint. On appeal, the Court of Appeals affirmed and held:

> Whether to place a traffic control signal or device in the first instance is a discretionary decision. . . (p. 700)
>
> Here, whether to place a stop sign or other traffic control device at the intersection of Jones Creek Road and North Hummingbird Road was a discretionary decision to be made by defendant Petty, an employee of defendant Dixon County. Even if defendant Petty abused the discretion, immunity from suit is not removed. (p. 701)

In Romine v Metropolitan Dade County, 401 S.2d 882 (Fla., 1981) an accident occurred at an uncontrolled intersection between a westbound automobile and a northbound automobile. The southeast corner of the intersection was overgrown with trees and bushes which obstructed the vision of motorists entering the intersection. The trial court granted summary judgment for the county. On appeal, the decision was affirmed by the Court of Appeals. The court held:

> In the case sub judice, the negligence complained of was the failure of the county to make a decision to control the intersection with a device or devices different than that chosen and a decision as to whether or not to cut back undergrowth adjacent to the intersection. Clearly this would constitute planning or discretionary governmental decisions (under the guidelines set forth in Evangelical United Brethren Church v State, 67 Wash. 2d 246, 407 P.2d 440 (1965)). (p. 884)

In Tell City v Noble, 489 NE2d, 958 (Ind., 1986) a collision occurred at an intersection between a motorcyclist and a light truck. Noble alleged that Tell City negligently and carelessly failed to provide adequate signs, markings, and traffic controls at the intersection. The court held:

> After analyzing the above material, we find that the alleged negligent act in the instant case was Tell City's failure to erect traffic control devices at the intersection in question. . . (p. 964)
>
> . . . . the decision to erect traffic control devices is to be made by ordinance of the City Council and therefore the decision is legislative. . . .
>
> Non-action is likewise legislative and discretionary. . . .
>
> . . . Tell City is immune from liability for its decision not to erect a traffic control device at the intersection in question. . . .

In Bainter v Chalmers Township, McDonough County (Supra.), the court held:

> A township has no common law duty to widen roads, smooth gravel, erect signs, or mow weeds, and a public official has an absolute immunity from lawsuits challenging his acts of judgment or discretion. (p. 1196)
>
> Absent or statutory or common law duty, moreover, it is up to the township's discretion to decide whether road improvements such as clearing the brush in the instant case were necessary.

In Department of Transportation v Neilson, 419 S.2d 1071 (Fla., 1982), Neilson was involved in an intersection accident with another vehicle and alleged negligence in failing to install adequate traffic control signals and devices. The trial court dismissed the governmental entities. The Supreme Court held:

> The majority of such decisions have held that immunity attaches concluding that traffic control methods constitute a judgmental planning level decision. (p. 1076)
>
> As stated, the issue to be decided in this case is whether decisions concerning the installation of traffic control devices, the initial plan and alignment of

roads, or the improvement and upgrading of roads or intersections may constitute omissions or negligent acts which subject governmental entities to liability. We answer the question in the negative, holding such activities or basic capital improvements and/or judgmental planning level decisions. (p. 1077)

In Williamson v Pavlovich (Supra.), the case arose out of an accident in which 10-year-old Michael Williamson was struck by an automobile driven by Pavlovich in front of an elementary school. The Supreme Court reversed and held:

> Similarly the case before us today involves the weighing of "fiscal priorities, safety in various engineering considerations" on whether or not to install different traffic signs at a specified location in order to control congestion by removing parked or standing cars. We believe that the decision to install or forego installation of these signs on the location in question involved a high degree of official discretion. Therefore, we hold that the appellant is immune from tort liability in not erecting "No Standing" signs. (p. 1248) [Emphasis added]
>
> Generally, a municipality may not be found liable in negligence when its employees act or refuse to act so as to conform to a municipal ordinance and/or a state statute.
>
> We hold the decision to enforce certain traffic ordinances regarding the parking of automobiles does not create a special duty in and of itself and a municipality shall generally not be held liable for failing to enforce such ordinance. (p. 1241)

In Kolitch v Lindedahl, State of New Jersey, 497 A2d 183 (NJ, 1985), the court held:

> We also agree that the setting of the speed limit in the first instance is a discretionary function.
>
> Nor is the state liable for its failure to warn of the hazardous nature of the curve itself.
>
> We agree as well that the public entity could not be held liable for failure to provide "emergency signals, signs, markings, or other devices . . . ."

In Applegate v. Duncanside, 502 NE2d 249 (Ohio, 1986), the plaintiff "sought

to impose liability on county commissioners for negligently failing to trim grass and weeds growing in the median strip at the intersection in question." The trial court granted summary judgment and on appeal summary judgment was affirmed. The court held:

> Although appellants acknowledged the absence of any statutory duty . . . appellants contend they should still be permitted to proceed against appellee (county) under a common law theory of negligence. (p. 252)
>
> Liability for tortious conduct is premised upon the existence of an expressed duty albeit common law or statutory owed by the defendant to the plaintiff.
>
> In the absence of such duty, appellants cannot recover against appellee . . . .

There are many other cases, too numerous to recite in detail, which affirm the overwhelming general rule that the decision to place, or not to place, traffic control devices on public streets is a discretionary decision and that the government entity is immune from suit. We do recite the holdings in a number of other cases.

In Gallison v City of Portland, 586 P2d 393 (Ore., 1978). (Placement location of signs and signals is discretionary.) In Robinson v City of Bartlesville, 700 P2d 1013 (Okla., 1985). (Decision of whether to install or maintain street lighting or traffic control devices is a discretionary act.) Garland v Ohio Department of Transportation, 548 NE2d 233 (Ohio, 1990). (Governmental entity is immune from suit when it makes decision as to what type of traffic signal.) Barrera v City of Garland, 776 SW2d 652 (Texas, 1989). (City immune from liability arising from its failure to post lower speed limit sign.)

Also: Rapp v State of Alaska, 648 P2d 110 (Alaska, 1982). (State's failure to install a sequential traffic sign in lieu of a stop sign was discretionary.) Brohman v State, 749 P2d 67 (Mont., 1988). (State's duties with regard to placement of signs and markings is discretionary.) Robinson v State Department of Transportation, 465 So.2d 1301 (Fla.,

1985). (Government's initial decision of whether to utilize left-turn signal is discretionary.) Ochoa v City of Oklahoma City, 635 P2d 604 (Okla., 1981). (Installation of street or area lighting is discretionary.) Tatalovich v City of Superior, 904 F2d 1135 (Wisc., 1990). (Decision of whether to place barricade or warning sign on street is discretionary.) Smith v Oral Roberts University, 732 P2d 450 (Okla., 1986). (City has no duty to remove vegetation located on private property even though obstructing view of motorists.)

B. No Legal Duty

Plaintiff's claims are based upon tort founded upon the claim of negligence. A tort is defined as a "violation of a duty imposed by law" (Lowry v Kansas City (Supra.). The cases reported here are representative of the general rule that there is no legal duty on governmental entities to place traffic signs on public streets.

In Slavin v City of Tucson (Supra.), plaintiff's decedent was driving an automobile southbound at an intersection. His automobile was struck on the left side by an automobile going westbound. Both drivers' visibility was obscured by a hedge growing on property on the northeast corner of the intersection. There were no traffic control signs. The trial court granted defendant's motion for directed verdict. Upon appeal, the decision was affirmed. The court held:

> In particular, the plaintiff claims that the city was negligent in failing to warn of a dangerous condition on its highway . . . . We do not perceive that such general statement of law applies to the facts of the case sub judice.
>
> Second, there is no duty on the city to regulate traffic by posting signs or otherwise. Third, there is no duty to warn of dangerous conditions in a public road.

In Szymanski v State of Colorado, 776 P2d 1124 (Colo., 1989), plaintiff

complained that there was a blind spot at the intersection and that the site lines were improper. Trial court dismissed the complaint and the Court of Appeals affirmed. The court held that there was no duty and that the motorcyclist could not sue the city based on an alleged blind spot at the intersection and absence of warning signs.

In Ashland v Pacific Power and Light, 397 P2d 538 (Ore., 1964) the action was by an automobile passenger for injuries sustained when the host driver failed to stop at a stop sign. The court held that the state highway commission's regulations relating to the placement of a stop sign did not impose a duty that was owed to the automobile passenger or any other member of the public.

In Mitten Huber v Herrera, City of Redondo Beach, State of California, Cal. Rptr. 694 (Calif., 1983) the court held the city is under no affirmative duty to erect stop signs at an intersection.

> To hold that the city had the affirmative duty to erect stop signs at the intersection in question would unduly extend the scope of the public liability law and go far toward to establishing the rule that a municipality is an insurer.

In Zens v Chicago, Milwaukee, St. Paul, and Pacific Railroad Company and Aberdeen Township, 386 NW2d 475 (So. Dak., 1986) Zens was a passenger in a bus. The bus was heading toward the work site and veered into a ditch. The trial court granted summary judgment. The Supreme Court affirmed. The court held:

> Thus no liability is imposed for failure to install adequate signs warning of highway dangers.

In Monaghan v DiPaulo Construction Company, Illinois State Department of Highways, 49 NE2d 409 (Ill., 1986) the plaintiff alleged breach of duty by the city in failing to illuminate the median strip or in failing to provide barricades or signs. The court held

there was no legal duty to do so.

C. Section 63-30-8 does not waive immunity

Plaintiff cites Section 63-30-8 of the Act, which is as follows:

> Immunity from suit of all governmental entities is waived for any injury caused by a defective, unsafe, or dangerous condition of a highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located thereon.

Plaintiff suggests that this section modifies Section 63-30-10(1)(a) of the Act. Section 63-30-8 does not apply. It waives immunity for any injury caused by a defective, unsafe, or dangerous condition of a road. In the present case, the failure to place a traffic control device at the intersection is not a condition of a road. A non-existent traffic device is not a condition of a road.

Section 63-30-8 provides for a waiver or exception to immunity. It does not provide for a new duty in tort law. In Stevens v. Salt Lake County, (Supra.) wherein a 13-year-old boy was riding his mini-bike along a pathway in a vacant lot and emerged through brush and weeds on private property and onto an unimproved county road, the court held:

> Plaintiff's averment as to the fault on the part of the county does not stem from any condition upon or within the public roadway itself. Rather, it is based upon his contention that weeds and brush growing alongside the road so obscured the view of travelers thereon that this constituted a "defective, unsafe, or dangerous condition of the highway," which it was the duty of the county to remedy and for which liability was removed by our new governmental immunity act.[9]
>
> * * * * *
>
> This statute does not create any liability where none would have therefore existed. Its sole purpose and a effect is to remove sovereign immunity in situations where there would have been liability but where sovereign immunity formally prevented recovery.

[9] Section 8, Ch. 139, S.L.U. 1965, codified as Section 63-30-8, U.C.A. 1953.

Plaintiff cites Bigelow v. Ingersoll, 618 P2d 50 (Utah, 1980), Bowen v. Riverton City, 656 P2d 434 (Utah, 1982), and Richards v. Leavitt, 716 P2d 276 (Utah, 1985). In Bigelow, the claim was that the state negligently designed an existing traffic control light at an intersection. The court held that the design of the traffic control system did not involve basic policy-making level. In Bowen, the plaintiff was involved with an intersection accident. On the day of the accident, the stop sign regulating northbound traffic was lying on the ground. The court held that the city had a non-delegable duty to exercise due care in maintaining streets and in maintaining an existing traffic control sign. In Richards, the plaintiff alleged that the city was negligent in failing to maintain a stop sign. The court held that the maintenance of a traffic control device was a governmental function and that the claim was barred for failure to give notice.

These cases are clearly distinguishable. They all involve cases where traffic control devices have been installed or placed. Whereas, in the present case, the non-decision to place a traffic control device at the intersection was made at a policy-making level and was therefore discretionary. Once the decision has been made to place a traffic control device, then the maintenance of that device and the condition of the road is at the operational level and therefore is non-discretionary. This rule is consistent with the general rule enunciated in Robinson v. State Department of Transportation (Supra.) and also Dudum v. The City of San Mateo, 334 P2d (Cal., 1959), which is that the initial decision to utilize a traffic control device is a planning level decision and therefore discretionary. Once that decision is made, subsequent maintenance or non-maintenance of the traffic control device is an operational function and therefore non-discretionary.

Even so, as argued in Point I (C) of the Brief, the 1991 Legislature amended Section 8 and added: "Unless the injury arises out of one or more of the Exceptions to Waiver set forth in Section 63-30-10, immunity from suit of all governmental entities is waived . . . ." While the amendment was made effective April 29, 1991, it was an obvious attempt to clarify the unclearness between the relationship between Section 63-30-8 and Section 63-30-10. It obviously does not represent a change in philosophy as to immunity.

IV.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING SUMMARY JUDGMENT BEFORE PLAINTIFF'S REQUESTED DISCOVERY WAS COMPLETED.

The Plaintiff claims that the court abused its discretion in granting Summary Judgment before Plaintiff's request for discovery was completed. Before making a ruling on this point, it is essential that there is a clear understanding of the chronology of events which is as follows:

Document		Date Filed
1.	Complaint (R-1)	September 6, 1988
2.	Certificate for Readiness of Trial	November 23, 1990
3.	Pre-Trial Hearing (R-42) (Minute entry provided that Defendant will file Motion on governmental immunity within 30 days)	January 7, 1991
4.	Motion for Summary Judgment (R-44)	January 31, 1991
5.	Plaintiff's Memorandum in Opposition (R-111) (Plaintiff did not dispute Defendant's Statement of Material Facts and **no affidavits were filed**)	February 13, 1991

6.	Hearing on Motion for Summary Judgment -- February 26, 1991	
7.	Plaintiff's Motion to Continue (R-134)	March 4, 1991
8.	Ruling on Motion for Summary Judgment (R-137)	March 25, 1991
9.	Plaintiff's Motion for Reconsideration (R-156)	March 29, 1991
10.	Plaintiff's Memorandum in Support of Motion for Reconsideration (R-158) (Affidavits attached to Memorandum)	March 29, 1991
11.	Plaintiff's Reply Brief (Affidavits attached to Memorandum	April 29, 1991
12.	Ruling on Motion for Reconsideration (R-258)	April 29, 1991

The complaint was filed September 6, 1988. More than two years and two months thereafter, Plaintiff filed a Certificate for Readiness of Trial. Between those two filings, the Plaintiff undertook discovery by way of Interrogatories, Demand for Production of Documents, and depositions.

In response to Defendant's Motion for Summary Judgment, Plaintiff filed his Memorandum in Opposition, but he did not file a Response Affidavit and notably did not file a Rule 56(f) Affidavit.

The hearing on the Motion for Summary Judgment was held February 26, 1991. On March 4, 1991, Plaintiff filed a Motion to Continue. The court ruled on the Motion on March 25, 1991; on March 29, 1991 the Plaintiff filed a Motion for Reconsideration. In his Memorandum in support of Plaintiff's Motion for Reconsideration (R-158), Plaintiff provided the factual information he sought to discover previously, to wit:

That Bountiful City voluntarily undertook the duty to restrict foliage at intersections (R-162); two affidavits (R-167, 169) stating that the city had been notified of foliage obstructing the intersection.

Plaintiff filed a Reply Brief on April 29, 1991, wherein he alleged and provided all the factual information he obtained by discovery.

In the court's ruling on Plaintiff's Motion for Reconsideration (R-258), the court stated:

> The court recognizes there is generally no such motion as Motion for Reconsideration. The court nevertheless has read all additional briefs submitted by the parties.

Accordingly, the court, before its ruling on Plaintiff's Motion for Reconsideration, was privy to all the factual information the Plaintiff discovered or hoped to discover.

Rule 56(f) of the Utah Rules of Civil Procedure provides:

> **(f) When affidavits are available.** Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit the facts essential to justify his opposition, the court may refuse the application for judgment . . . .

In Sandy City v. Salt Lake County, 794 P2D 482 (Utah, 1990), the court stated:

> A Rule 56(f) movant must file an affidavit to preserve his or her contention that Summary Judgment should be delayed pending discovery . . . . In this affidavit, the movement must explain how the requested continuance will aid his/her opposition to Summary Judgment.
>
> * * * * *
>
> To determine whether this affidavit was sufficient to merit a Rule 56(f) continuance, several factors must have been considered: (1) Were the reasons articulated in the Rule 56(f) affidavit adequate . . . ? (2) Was there sufficient

> time since the inception of the lawsuit for the party against whom the Summary Judgment is sought to use discovery procedures? (3) If discovery procedures were timely initiated, was the non-moving party afforded an appropriate response?

This case is dispositive. The Plaintiff had more than ample time to initiate the discovery procedures which he did. He then filed a Certificate of Readiness of Trial more than two years and two months after the complaint was filed, and finally the Plaintiff did not file a Rule 56(f) affidavit.

Even so, the basis for Plaintiff's Motion to Continue was to discover irrelevant information; that is, irrelevant for the purposes of a Motion for Summary Judgment. All the facts (which were not disputed) relevant to a Motion for Summary Judgment are: (1) That an accident happened at an intersection; (2) That the intersection was uncontrolled; (3) That the foliage was located on private property; and (4) That the decision of placing or not placing traffic control devices was exclusively recommended by the Traffic Safety Committee and subject to the approval by the Bountiful City Council.

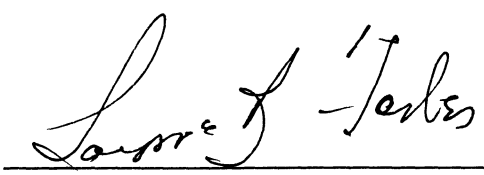
In Plaintiff's Memorandum in Opposition to Defendant Bountiful City's Motion for Summary Judgment (R-112), the Plaintiff did not dispute paragraphs 1 to 10, inclusive of Defendant's Statement of Material Facts as set forth in its Memorandum of Points of Authorities (R-89).

The trial court granted Summary Judgment based upon the fact that the City was immune from performing or not performing discretionary functions and making inspections, and further, that there was no legal duty. Accordingly, the City knowledge and receiving notice of obstructions of the intersection were irrelevant and immaterial.

CONCLUSION

Accordingly, Bountiful is immune from suit for failure to facilitate the removal of foliage from private property and there is no legal duty to facilitate the removal. Bountiful is immune from suit for failure to place traffic control devices and there is no legal duty to do so. The trial court did not abuse its discretion in granting Summary Judgment before Plaintiff's requested discovery was concluded.

Respectfully submitted this 30th day of August, 1991.



Layne B. Forbes
Attorney for Defendant, Bountiful City

CERTIFICATE OF MAILING

I hereby certify that I caused a copy of the foregoing appellant court Brief to be mailed, postage prepaid, on the 30th day of August, 1991 to the following:

Brian S. King
Attorney for Plaintiff
Goicoechea Law Offices
4516 South 700 East, Suite 280
P. O. Box 17345
Salt Lake City, Utah 84107

Darwin C. Hansen
Attorney for Rowena Beavers
Morgan & Hansen
136 South Main, Suite 800
Salt Lake City, Utah 84101

Layne B. Forbes
Attorney for Defendant, Bountiful City